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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

IOWA BEEF PROCESSORS, INC., EDWARD W. ROTHE, and LEE A. FREEMAN, SR.,

Petitioners,

vs.

LEX HAWKINS and JOHN A. COCHRANE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY

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The respondents, finding it impossible to defend the anomalous Eighth Circuit decision that three federal courts must handle different aspects of one and the same controversy, resort to a series of distortions of the record (knowing that this Court cannot spend the time on a petition for certiorari to trace such record details) and *ad hominem* attacks on the petitioners' motivations to

argue that intercircuit conflicts should be left unresolved because the petitioners supposedly come without "clean hands" to this Court. Absent these obvious efforts to blur the issues and cover up their own wrongdoing,[1] the weakness of respondents' opposition to certiorari demonstrates how indefensible the Eighth Circuit decision is.

I.

Respondents Concede That The Eighth Circuit's Compulsory Counterclaim Holding Conflicts With Other Circuits

The respondents do not really deny that the Eighth Circuit's decision that their abuse of process action was not a compulsory counterclaim under Rule 13(a) to IBP's conspiracy action conflicts with the Second Circuit's decision in *Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057 (2nd Cir. 1977), and the Third Circuit's decision in *Great Lakes Rubber Corp. v. Herbert Cooper Co., Inc.*, 286 F.2d 631 (3rd Cir. 1961). They try only to confuse the question by asserting that the two actions are logically related to the *MPIA* antitrust action now pending in the Northern District of Texas in Dallas. But, of course, if these two actions are logically related to the *MPIA* action, they necessarily are also logically related to each other.[2]

[1] Respondents fail to note that the Eighth Circuit found their contacts with Bagley to be unethical but declined to disqualify them as counsel in the antitrust case because Spencer had not shown prejudice and the Court did not want to harm Hawkins and Cochrane's clients. *Meat Price Investigators Ass'n v. Spencer Foods, Inc.*, 572 F.2d 163, 165 (8th Cir. 1978).

[2] The respondents' query (pp. 18-19), whether both actions should be transferred to the Northern District of Texas for consolidation with the antitrust cases pending there, is a red

(Footnote continued on following page)

That the abuse-of-process claims are logically related to IBP's action under Rule 13(a) is further supported by two recent district court decisions. In *Fox Chemical Co. v. Amsoil, Inc.*, 445 F.Supp. 1355, 1361 (D. Minn. 1978), Chief Judge Devitt (ironically of the district court which, under the Eighth Circuit's ruling, would be required to handle respondent Cochrane's severed claim) held that a counterclaim for libel stemming from "the same aggregate of operative facts" as the main Lanham Act action was logically related to the main action and thus was compulsory. Similarly, Judge Lasker in *Cannizzaro v. Bache, Halsey Stuart Shields, Inc.*, ... F.R.D. ..... (S.D.N.Y. 3/6/79), held that a libel counterclaim to a securities action also was compulsory:

> "Cooper's counterclaim alleges that the plaintiffs defamed him by stating to third parties that he had ' "churned" and acted fraudulently with regard to plaintiffs' securities investments', the very same claims made in the complaint. Thus, the assertion of a defense of truth, a likely prospect in this situation, would require exploration of the identical factual and legal questions raised by the allegations of the

[2] *continued*

herring. The only relationship between these actions and the antitrust cases is that Hawkins and Cochrane induced Bagley to violate his contractual and fiduciary duties to IBP in order to determine whether he had any information or documents which might be helpful to them as the antitrust plaintiffs' counsel. Except for Hawkins and Cochrane, none of the defendants in IBP's Sioux City case would have any interest in having the case transferred to Dallas. They do not reside there and are not parties to the antitrust case. Moreover, there would be little benefit to judicial administration by requiring a Texas federal judge to preside over diversity lawsuits based upon Iowa law. Transfer of these actions to Dallas would only further complicate the complex litigation now pending before Judge Taylor. In addition, Chief Judge McManus in the Sioux City case has specifically stated his intent to prevent any interference with the antitrust cases through discovery in IBP's case. (Petn. App. C-9.)

complaint. Accordingly, * * * the counterclaim is compulsory * * *."[3]

Precisely the same situation is present here since respondents' abuse-of-process claims will require an examination of the factual and legal support for IBP's action against respondents. Against this weight of authority provided by *Newburger, Great Lakes Rubber, Fox Chemical,* and *Cannizzaro,* the respondents, like the Eighth Circuit, can rely only upon the cryptic discussion and holding of *Bose Corp. v. Consumers Union,* 384 F.Supp. 600, 603 (D. Mass. 1974). Except for the Eighth Circuit's grasping for any straw of authority to support its perverse procedural result, *Bose* might properly have been forgotten because of the weight and the reasoning of the above authorities, but the Eighth Circuit's reliance upon it now requires a resolution of this intercircuit conflict by this Court.

II.

Respondents Do Not Deny An Intercircuit Conflict On The Relation-Back Issue

Respondents continue to rely upon the Eighth Circuit's fact-defying concept that IBP's action in Sioux City, filed on June 7, 1977, was actually "not pending" when respondents' abuse-of-process claim was filed in Des Moines on July 22, 1977, because IBP subsequently amended its complaint to cure a technical jurisdictional defect. They avoid any discussion of the authorities cited in the Petition and in Judge Bright's dissent from denial of rehearing which hold that such a jurisdictional amendment does "relate back" to the date on which the complaint was initially filed. Respondents thus ap-

[3] The *Cannizzaro* decision has not yet been published, although it soon will be. Copies of the galley sheets of the opinion, obtained from West Publishing Co., have been filed with the Clerk and sent to respondents' counsel.

parently concede that there is an intercircuit conflict on this point, but contend that certiorari should not be granted for other reasons.

The first reason is their claim (p. 14) that no case holds "that a party has the duty to wait to file a counterclaim in anticipation that a claimant might cure a subject matter jurisdictional problem." But this argument has no relevance here. At the time they instituted their abuse-of-process action, respondents had on file a motion to dismiss IBP's Sioux City action which eliminated a need to file an answer until that motion was decided. IBP's amended complaint was subsequently filed, and Chief Judge McManus later denied respondents' motion to dismiss on the ground that the amendment had cured the jurisdictional defect. (Petn. App. C-3-6.) Respondents then obtained a continuance of the deadline for filing their answer, and in April, 1978 finally filed an answer containing a "conditional counterclaim" restating their abuse-of-process cause of action in case the Eighth Circuit upheld the dismissal of their Des Moines action. In addition, IBP's New York action was dismissed voluntarily before any answer was due.

Respondents' only other argument against the relation-back of IBP's jurisdictional amendment is that they would suffer some unspecified prejudice from being a joint defendant with the Amalgamated Meat Cutters Union in Sioux City.[4] This is an entirely new claim never before mentioned by the respondents, and it is plainly a cover for their real fear that their abuse-of-process claim would have a short life span in Chief

[4] Respondents also claim (p. 17) to be harmed by being denied their choice of forum, but that begs the questions whether venue for their action was properly in Des Moines and whether it was instead controlled by Rule 13(a) and had to be filed as a counterclaim in Sioux City.

Judge McManus' court. In objecting to IBP's production request for the materials given them by Bagley, the respondents argued to Chief Judge McManus (as they do here) that the production request itself was an abuse of process. Chief Judge McManus rejected that argument and compelled respondents to comply with IBP's production request, which they did. Furthermore, Chief Judge McManus has an intimate knowledge of Iowa abuse-of-process law, see *Bickel v. Mackie*, 447 F.Supp. 1376 (N.D. Ia. 1978), which would prevent respondents from continuing to bluff that they have some basis for their abuse-of-process cause of action.

III.

Respondents Agree That The Eighth Circuit Erred In Its Venue Ruling

The respondents not only fail to defend the Eighth Circuit's construction of the "where the cause of action arose" provision of 28 U.S.C. § 1391(a), but they actually concede that the decision below is erroneous. They continue to contend (p. 14) that proper venue for respondent Cochrane's action is in Des Moines rather than Minnesota. But to avoid a decision by this Court that the Eighth Circuit venue decision was completely erroneous, the respondents are willing to accept the splitting of their complaint between two districts.

However, the respondents make only a half-hearted attempt to cover up the conflict in venue tests between the Eighth and Ninth Circuits, saying only that a "close examination" of the decision below and *Commercial Lighting Products, Inc. v. United States District Court*, 537 F.2d 1078 (9th Cir. 1976), reveals that the same test was used. But respondents do not deny that the Eighth Circuit confused the "minimum contacts" rule for personal jurisdiction with the "weight of contacts" test for venue. This confusion plainly stems from the previously

stated view of District Judge Becker, the author of the Eighth Circuit's opinion, that the tests for personal jurisdiction and venue are the same, *Stith v. Manor Baking Co.*, 418 F.Supp. 150, 154-155 (W.D. Mo. 1976), a ruling directly in conflict with *Commercial Lighting, supra*, 537 F.2d at 1079-1080, and the Eighth Circuit's prior decision in *Gardner Engineering Corp. v. Page Engineering Co.*, 484 F.2d 27, 30-33 (8th Cir. 1973). The opinion here, however, failed to cite *Stith* or any other authority for its divergence from *Gardner*.

Judge Becker's equating of personal jurisdiction and venue also explains the Eighth Circuit's unprecedented holding that mere receipt of process in a district is a sufficient basis for venue in that district.

Respondents also resurrect (p. 14) the Eighth Circuit's faulty reasoning that if the abuse-of-process claim arose in Sioux City, a second claim arose in New York, which for some reason means that venue is not proper in Sioux City. Judge Bright again provides the correct analysis (Petn. App. A-30): "[I]f venue is proper in the Northern District of Iowa, Hawkins and Cochrane could join, as pendent claims in their Northern District of Iowa action, any cause of action arising out of IBP's alleged abuse of the New York court's process. *See* Fed.R.Civ.P. 18(a)."

Any sensible construction of the venue provision for diversity suits must agree with the District Court's decision here that proper venue is in the court whose process is supposedly being abused.[5]

[5] Reports of the oral argument in *Leroy v. Great Western United Corp.*, No. 78-759 (argued April 17, 1979), indicate that considerable attention was given to the "where the cause of action arose" provision in 28 U.S.C. § 1391(b). See 47 U.S.L.W. 3693-3695 (April 24, 1979). Consequently, the decision in *Great Western* may have a significant impact on this case, and petitioners suggest that this Petition be held until *Great Western* is decided.

CONCLUSION

The decisions cited above—*Newburger, Great Lakes Rubber, Cannizzaro, Fox Chemical* and *Bose*—as well as this case itself, reveal that the retaliatory tactic of a defendant filing a counterclaim attacking the main complaint against it as being an abuse of process or libelous is becoming very common. Except for *Bose* and the decision below, the federal courts have reacted properly to such tactics by fashioning a rule that would limit the undesirable burden on the courts resulting from such retaliation by compelling litigation of such claims jointly with the main actions attacked. The contrary decision below, however, will bind all courts in the Eighth Circuit and be an available precedent for litigants elsewhere who want to make a plaintiff pay for filing an action against them through the cost and harassment of litigating the same issues in one or two other courts simultaneously. The errors below and the conflicts that they have created must be eliminated immediately to nip such pernicious effects in the bud.

Respectfully submitted,

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